## PUBLIC PROSECUTOR v. KOH CHIN MONG

[A.C.J. (Adams J.) August 10, 1961]

[Muar — Criminal Appeal No. 28 of 1961]

*Road Traffic — Licence — Vehicle without licence and certificate of insurance — Whether onus on prosecution or defence — Road Traffic Ordinance, 1958, ss.22(1) and 74(2) — Evidence Ordinance, 1950, s.106.*

Where the charge is one for doing something under the Road Traffic Ordinance, 1958, for which a licence is required under that Ordinance, the burden of proof is upon the accused to show that he was in possession of the necessary licence.

*Cases referred to:—*

(1) *Public Prosecutor* v. *Chin Yoke*, [1940] M.L.J. 47.

(2) *Khoo Teck Yam* v. *Public Prosecutor*, [1955] M.L.J. 112.

(3) *Rex* v. *Oliver*, [1944] K.B. 68.

(4) *John* v. *Humphreys*, [1955] 1 W.L.R. 325.

CRIMINAL APPEAL.

*Hamzah bin Dato' Abu Samah* (Deputy Public Prosecutor) for the appellant.

Respondent in person.

**Adams J.** (delivering oral judgment): The defendant stands charged with two charges of using a motor car without there being in force in respect to the said vehicle a motor vehicle licence contrary to section 22(1) of the Road Traffic Ordinance, 1958, and secondly, that the defendant used the motor vehicle without there being in force in relation to the motor vehicle a policy of insurance in respect to third party risks contrary to section 74(2) of the Road Traffic Ordinance.

The evidence established that on the 23rd August, 1960, P.C.3217 Lim Kim Sai saw the defendant driving the motor vehicle named in the charge. He stopped the motor vehicle and found that it had no current motor vehicle licence. The defendant was unable to produce any certificate of insurance in respect to the vehicle.

The learned Magistrate, Batu Pahat, discharged the accused without calling upon the defence on the grounds apparently submitted by Mr. Paramjothy that the prosecution should have produced some certificate or other evidence to prove that the vehicle was not in fact licensed and there was not in fact a certificate of insurance in respect thereto.

I was under the impression that this matter had been settled once and for all by the case of *Public Prosecutor* v. *Chin Yoke* [1] which was followed in *Khoo Teck Yam* v. *Public Prosecutor* [2]. If any more support were needed for the proposition that in a prosecution for an offence of doing something for which a licence is required under the Road Traffic Ordinance, it is unnecessary to call a licensing officer to prove the non-issue of the licence and that the burden is on the accused to negative the averment of being unlicensed by producing in this case (a) the vehicle licence, and (b) the certificate of insurance, there are the two further cases of *Rex* v. *Oliver* [3] and *John* v. *Humphreys* [4]. All the above cases apply in practice the proposition of law laid down by section 106 of the Evidence Ordinance of which both the learned Magistrate and Mr. Paramjothy must be well aware.

The order of acquittal is set aside and the case must go back to the Magistrate with a direction that he call upon the defence.

I would suggest that the Magistrate, Batu Pahat reads his Evidence Ordinance and his cases and applies what he has read to the facts of the case to be decided.

*Order accordingly.*

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## CHEN FAN CHIANG v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) August 14, 1961]

[K.L. — F.M. Criminal Appeal No. 19 of 1961]

*Criminal Law and Procedure — Murder — Penal Code, s.302 — Killing in the presence of several witnesses — Conflicting evidence of witnesses — Availability of evidence for jury to find culpable homicide not amounting to murder — Possible verdict of culpable homicide not amounting to murder not left to jury — Statement of witness sought to be used under Criminal Procedure Code (Cap. 6), s.113(ii) — Effect of failure of trial Judge to allow it to be used to impeach credit of witness.*

On a charge of murder where there is evidence, whether reliable or not, which if accepted would entitle the jury to bring in a verdict of culpable homicide not amounting to murder, the charge to the jury must leave open the possibility of bringing in a verdict of culpable homicide not amounting to murder even if no defence is relied upon which would reduce the charge from one of murder to one of culpable homicide not amounting to murder.

Observations upon effect of trial Judge's failure to permit a statement of a witness to be used to impeach credit of witness under section 113(ii) of the Criminal Procedure Code.

*Cases referred to:—*

(1) *R.* v. *Hopper*, [1915] 2 K.B. 431.

(2) *Kwaku Mensah* v. *The King*, [1946] A.C. 83.

(3) *Bullard* v. *The Queen*, [1957] A.C. 635.

COURT OF APPEAL (CRIMINAL).

*David Marshall* for the appellant.

*B. T. H. Lee* (Deputy Public Prosecutor) for the respondent.

**Thomson C.J.** (delivering oral judgment): This appellant was convicted for murder at the Johore Bahru Assizes on 9th July this year and was sentenced to death. Against that conviction he has now appealed.

The charge against the appellant was that on 2nd February, sometime before dawn, in or close to a bus at the entrance to an estate at Kulai he killed one Moo Kim Sang in circumstances which made the killing murder.

There is no doubt that at the time and place in question Moo Kim Sang was killed by the insertion of a rubber-tapping knife into a vital

portion of his anatomy and, to put it at the lowest, there was a considerable body of evidence which went to show that the person who did the killing was the present appellant. That, of course, is far from concluding the question of whether the appellant was guilty of the murder with which he was charged.

We have come to the conclusion that the conviction for murder cannot stand, but, for reasons which will soon be obvious, we do not propose to discuss the case at very great length.

In effect, including the appellant himself, seven persons who claimed to be eye-witnesses to the whole or a part of the occurrence gave evidence at the trial.

Four of these gave evidence for the prosecution. One was the wife of the deceased; a second was a daughter of the deceased; a third was a son of the deceased; and the fourth was a person named Lee Kai Lan, who was an independent witness in the sense that he was unconnected with anybody.

Three witnesses gave evidence for the defence. There was the appellant himself; there was his sister who claimed to be present; and there was the driver of the bus in and about which the incident took place who would certainly seem to have been an independent witness but unfortunately, because he was concerned with making his bus go, did not see the beginning of the occurrence.

None of these witnesses gave evidence which corresponded in every detail with the evidence of any other of them and in the circumstances we are of the opinion that the first thing the jury should have been asked to do was to consider the evidence of each of them and to extract from that evidence so much as they thought was true and discard so much as they thought was untrue. Instead of that the matter was put to them as a case of the appellant's story being true or the rest of the evidence being true. If the appellant's story was true he is not guilty of any offence. But if the rest of the evidence was true then it made out murder and on that basis the case was one of murder or nothing.

In our view, and this is our main reason for allowing the appeal, the way in which the evidence was approached led to it being overlooked that there was evidence (I do not say for a moment that it was reliable evidence) on which, if it were accepted, it was open to the jury to bring in a verdict of culpable homicide not amounting to murder on the ground of provocation or of excessive exercise of the right of private defence or of killing arising out of a sudden fight. In our view, considering the evidence as a whole, the appellant was entitled to have the possible verdict of culpable homicide not amounting to murder left to the jury even though it was not a defence which was relied upon. Authority for that is to be found in the cases of *R.* v. *Hopper* [1], *Kwaku Mensah* v. *The King* [2] and *Bullard* v. *The Queen* [3] which this Court has followed on previous occasions.

That one reason would in itself be sufficient for setting aside the conviction for murder.

There is, however, another point of perhaps less importance which we wish to mention. It was the appellant's case that the whole trouble began not during his seeking out the wife of the deceased, as was alleged by the prosecution, but in consequence of his being waylaid by the young son of the deceased who had just returned from Kuala Lumpur. He alleged that this young man waylaid him and while he was proceeding about his own business stabbed him with a tapping knife in the stomach. The young man was called by the prosecution and he gave an account of the subsequent incident at the bus, which completely excluded any mention of a previous incident between himself and the deceased the same morning. That evidence may or may not have been true — the evidence of the young man. The fact remains, however, that a little later in the morning he made a statement to the Police which contained an admission which his evidence did not mention that he stabbed the appellant in the stomach though, it is true, he said he did so at the bus. The defence sought to put that statement in evidence as a first report and they also sought to cross-examine on it under section 113 of the Criminal Procedure Code.

With regard to its being a first report, we do not propose to discuss the point at length beyond saying that in our opinion it was not a first report. In our view, however, the trial Judge whose attention was invited to the statement should have allowed it to be used under section 113(ii) of the Criminal Procedure Code to impeach the witness's credit. Had it been so used we are not prepared to express any opinion as to what the effect would have been on the minds of the jury.

In our view, then, the conviction must be set aside. In view, however, of the state of the evidence and in particular in view of the trial Judge's refusal to allow the deceased's son to be cross-examined on his statement to the Police, we have no option but to order a re-trial and we order accordingly.

*Re-trial ordered.*